

VOSH PROGRAM DIRECTIVE: 04-001C**ISSUED: 01 August 2012****Subject: VOSH Discrimination Investigation Manual**

Purpose **CHANGE I:** This Directive sets forth and implements policy, procedures and other information on the handling of discrimination complaints by the VOSH Discrimination Investigator. Specifically, it deals with the rights of employees afforded under Virginia Code §40.1-51.2:1. The Virginia statute provides protections similar to those of section 11(c) of the federal Occupational Safety and Health Act which prohibits reprisals, in any form, against employees who exercise rights under the federal Act.

CHANGE II: This Change sets forth policy, procedures and other information relative to the handling of discrimination complaints under the various “whistleblower” statutes delegated to OSHA/VOSH.

CHANGE III: This Change acknowledges the new federal OSHA Whistleblower Investigations Manual and other information relative to the handling of retaliation complaints under the various whistleblower statutes delegated to federal OSHA.

This program directive is an internal guideline not a statutory or regulatory rule and is intended to provide instructions to VOSH personnel regarding internal operation of the Virginia Occupational Safety and Health Program and is solely for the benefit of the program. This document is not subject to the Virginia Register Act or the Administrative Process Act; it does not have general application and is not being enforced as having the force of law.

Scope

This Program Directive applies VOSH-wide and specifically to the VOSH Discrimination Investigator. Although this manual includes whistleblower statutes, the VOSH program, however, only has authority to enforce the statute under Section 11(c), Discrimination Complaints to State Plan States.

NOTE: *The federal Office of the Whistleblower Protections Program (OWPP) has the responsibility of investigating retaliation allegations within federal occupational safety and health jurisdiction. In addition to federal OSHA jurisdiction, the Office of the Whistleblower Protection Program investigates whistleblower and retaliation allegations for more than twenty other federal statutes that protect employees who report violations of various airline, commercial motor carrier, consumer product, environmental, financial reform, food safety, health care reform nuclear, pipeline, public transportation agency, railroad, maritime and securities laws. Due to the constant amendments and additional statutes being added to federal responsibility, VOSH personnel should refer to the federal Whistleblower Investigations Manual for a complete list of the statutes investigated. Additional information may also be available from OSHA’s OWPP website. <http://www.whistleblowers.gov/index.html>*

References

OSHA Instruction CPL 02-03-003 (September 20, 2011)
VOSH Administrative Regulations Manual, §110 (September 21, 2006)
VOSH Field Operations Manual (December 2001; latest revision - May 19, 2010)
29 CFR Part 1977

Cancellation

VOSH Program Directive 04-001B (June 1, 2011).

Effective Date

01 August 2012

Action

Directors, Compliance Managers and the Discrimination Investigator shall assure that the policies and procedures established in this Directive are adhered to by VOSH in its discrimination investigations.

Expiration Date

Not Applicable.

Courtney M. Malveaux
Commissioner

Distribution: Commissioner of Labor and Industry
Assistant Commissioner - Programs
VOSH Directors and Managers
Legal Support and IMIS Staffs

Cooperative Programs Director and Manager
VOSH Compliance & Cooperative Programs Staffs
VOSH Discrimination Investigator
OSHA Region III and Norfolk Area Offices

VOSH DISCRIMINATION INVESTIGATION MANUAL



**COMPLAINTS OF DISCRIMINATION
AGAINST EMPLOYEES EXERCISING RIGHTS
UNDER § 40.1-51.2:1 OF THE CODE OF VIRGINIA**

**FOR THE
VIRGINIA OCCUPATIONAL
SAFETY AND HEALTH PROGRAM
OF THE
VIRGINIA DEPARTMENT
OF LABOR AND INDUSTRY**

REVISED MARCH 2011; 01 JULY 2012

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Chapter 1

Introduction

I. Introduction.

- A. **Discrimination Against Employees Who Exercise Their Safety and Health Rights.** Workers in Virginia have the right to complain to VOSH and seek an investigation of alleged workplace safety and health discrimination. Virginia Code §§40.1-51.2:1 and -51.2:2 authorize VOSH to investigate employee complaints of employer discrimination against employees who are involved in safety and health activities protected under Virginia laws, standards and regulations.
- B. **Examples of "Protected Activity."** Some examples of activities protected under Virginia law are lodging a complaint to your employer under or related to the safety and health provisions of Title 40.1 of the *Code of Virginia*; instituting or causing to be instituted any proceeding under or related to the safety and health provisions of Title 40.1 of the *Code of Virginia*; testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the *Code of Virginia*; cooperating with or providing information to VOSH personnel during a worksite inspection; or exercising on your own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the *Code of Virginia*. (See VOSH Administrative Regulations Manual (ARM), *Virginia Administrative Code*, 16 VAC 25-60-110).
- C. **Examples of "Discrimination or Retaliation."** Some examples of discrimination or retaliation are firing, demotion, transfer, layoff, losing opportunity for overtime or promotion, exclusion from normal overtime work, assignment to an undesirable shift, denial of benefits such as sick leave or vacation time, blacklisting with other employers, taking away company housing, damaging credit at banks or credit unions and reducing pay or hours.

II. Functional Responsibilities.

A. **Responsibilities.**

- 1. **VOSH Director.** The VOSH Director has overall responsibility for all discrimination investigation and outreach activities. The VOSH Director is authorized to issue determinations and approve settlement of complaints filed under Title 40.1-52.2:1 of the *Code of Virginia*. The VOSH Director is responsible for implementation of policies and procedures, and for the effective supervision of field investigations, including the following functions:
 - a. Receives VOSH discrimination complaints from OSHA, the regional offices, investigators, or other persons.

- b. Ensures that safety and health or environmental ramifications are identified during complaint screening and, when necessary, makes referrals to the appropriate office or agency.
- c. Schedules assignment of investigative cases to Investigator(s).
- d. May investigate and conduct settlement negotiations for cases that are unusual or of a difficult nature.
- e. Provides guidance, assistance, supervision, and direction to the Investigator(s) during the conduct of investigations and settlement negotiations.
- f. Reviews investigation reports for comprehensiveness and technical accuracy.
- g. Develops outreach programs and activities.
- h. Provides field training for Investigator(s).
- i. Performs necessary and appropriate administrative and personnel actions such as performance evaluations.

2. Investigator. The Investigator carries out responsibilities under the direct guidance and supervision of the VOSH Director which includes, but is not limited to, the following functions:

- a. Conducts screening of incoming complaints to determine whether the allegations warrant field investigation.
- b. Reviews case files in field offices for background information concerning any other proceedings which relate to a specific complaint.
- c. Interviews complainants and witnesses and obtains written statements as necessary and obtains supporting documentary evidence as available.
- d. Follows through on leads resulting from interviews and statements.
- e. Interviews and obtains written statements from respondents' officials, reviews pertinent records, and obtains relevant supporting documentary evidence.
- f. Applying knowledge of the legal elements and evaluating the evidence revealed, writes an investigation report detailing the facts of the case, analyzing the evidence, and recommending appropriate action to the VOSH Director.
- g. Negotiates with the respondent in merit cases to obtain a settlement agreement which provides prompt resolution and satisfactory remedy.
- h. Monitors implementation of agreements or court orders, as assigned, determining specific action necessary and sufficiency of action taken or proposed by the respondent. If necessary, recommends further legal proceedings to obtain compliance.

- i. Assists and acts on behalf of the VOSH Director in VOSH discrimination matters with other agencies, VOSH Regional Offices, and the general public.
 - j. Assists in the litigation process, including trial/hearing preparations and testifying in proceedings.
 - k. Performs outreach activities.
3. **Regional Director (RD).** Each RD is responsible for receiving discrimination complaints and promptly transmitting these complaints to the VOSH Director and/or the Discrimination Investigator.
 4. **Compliance Safety and Health Officer (CSHO).** Each CSHO is responsible for maintaining a general knowledge of the protections under Title 40.1-51.2:1 of the *Code of Virginia*. Using this knowledge, the CSHO may then advise employers and employees of their responsibilities and rights granted under the law, receive complaints and expeditiously notify the RD of the receipt of a discrimination complaint.
 5. **Division of Legal Support (DLS).** DLS provides assistance to the VOSH Director, gives advice to the Investigator(s), reviews cases submitted by the VOSH Director for their legal merits, makes decisions regarding those merits, and litigates those cases deemed meritorious as appropriate, when appointed as a Special Assistant Commonwealth's Attorney.

B. Personal Conduct and Activities.

1. **Courtesy to the Public.** The Virginia Department of Labor and Industry emphasizes that the proper and courteous discharge of duties and responsibilities by CSHOs and Investigators is essential to the effective administration of the law. The success of the program depends upon their knowledge and understanding of the laws and regulations as well as upon their courtesy and tact in dealing with employers and employees. Investigators represent the Commonwealth of Virginia and must at all time conduct themselves in such a manner as to reflect that responsibility. They must never indulge in conduct unbecoming their positions, even when such conduct is invited or incited by those with whom they are dealing.
2. **Correspondence with the Public.** Field personnel are the primary public relations representatives of the VOSH Program. All written correspondence received by Investigators from the public must be responded to in a prompt and courteous manner. For correspondence which is directed to an Investigator but which the Investigator must forward to a higher authority, other agency or person, the Investigator must notify the writer that the original correspondence is being forwarded for action by the authority, agency or person. Other inquiries received by Investigators which are outside the Investigator's scope of normal job activities must be forwarded to the appropriate representative or agency for action.
3. **Subpoenas and Testimony.**
 - a. An Investigator, upon being served with a subpoena, must immediately communicate with and forward all pertinent information to the VOSH Director. The VOSH Director will refer the matter to the DLS for action.

- b. Testifying in Proceedings. The Investigator may be required to testify in proceedings on behalf of the Commonwealth. The Investigator should keep this fact in mind when conducting an investigation and recording observations. Notes and reports must reflect conditions accurately and must be included in the case file. If the Investigator is called upon to testify, the reports and notes will be invaluable as a tool for recalling actual conditions and statements and reinforcing the facts of the case.

4. Release of Investigation Information.

- a. Investigation materials include notes, work papers, memoranda, records, and audio or video tapes received or prepared by an Investigator concerning, or relating to the performance of any investigation, or in the performance of any official duties. Such original material and all copies must be included in the case file, where necessary, to support the investigative findings. These records are the property of the Virginia Department of Labor and Industry and a part of the case file. Under no circumstances are investigation notes and work papers to be destroyed or retained or used by an employee of DOLI for any private purpose.
- b. The information and statements obtained may not be released under the Freedom of Information Act (FOIA) (See VOSH ARM, 16 VAC25-60-90.G). Requests for the public release of any information must be directed to DLS.
- c. Any FOIA inquiry received by an Investigator concerning an investigation must be transmitted to DLS.
- d. If, during the course of an investigation, the employer identifies any materials obtained as a trade secret or confidential commercial or financial information, information obtained in such areas shall be protected in accordance with the requirements in the VOSH Field Operations Manual (FOM).
- e. All interviews with non-management personnel and other statements by such persons will be kept confidential to the extent allowed by the law.

Chapter 2

Complaint Intake and Investigation Programming

- I. **Scope.** This chapter explains the general process for receipt of discrimination complaints, screening and docketing of complaints, initial notification to complainants and respondents, the scheduling of investigations, and recording the case data in OSHA's Integrated Management Information System (IMIS)/OSHA Information System (OIS).
- II. **Receipt of Complaint.** Any applicant for employment, employee, former employee or their authorized representative is permitted to file complaints under Title 40.1-51.2:1 of the *Code of Virginia* either orally or in writing with any official of the Virginia Department of Labor and Industry. Complaints may be received at any DOLI office or on referral by other government agencies.
 - A. When a complaint is received at a Field or Regional Office, basic information about the complaint must be obtained by the receiving person, and forwarded to the VOSH Director immediately. Alternatively, the complaint may be referred to the Discrimination Investigator for intake accompanied by an email to the investigator. In every case, the date of filing must promptly be recorded.
 - B. Whenever possible, the minimum complaint information should include: the complainant's full name, address, phone number and email address; the respondent company's name, address, and phone number; date of filing; date of adverse action; a brief summary of the alleged discrimination addressing the *prima facie* elements of a violation (protected activity, respondent knowledge, adverse action, and a nexus), the statute involved; and, if known, whether a safety, health, or environmental complaint has also been filed with VOSH/OSHA or other enforcement agency.
- III. **Screening and Docketing.**
 - A. As soon as possible upon receipt of the complaint, the available information should be reviewed for appropriate jurisdictional requirements, timeliness of filing, and the presence of a *prima facie* allegation. This may require preliminary contact with the complainant to obtain additional information or to explain to the complainant why the case cannot proceed to investigation. Complaints which pass this initial screening will be docketed for investigation. The term "docket" means to formally notify both parties in writing of VOSH's receipt of the complaint and intent to investigate, to assign a case number, and to record the case in the IMIS/OIS (the IMIS/OIS automatically assigns the local case number).
 - B. Complaints which do not allege a *prima facie* allegation, or are not filed within statutory time limits will not be docketed if the complainant indicates concurrence with the decision to close the case administratively. When a complaint is thus "screened out", the investigator must document the screening interview, obtain concurrence from the VOSH Director, and either send a letter to the complainant, or prepare a memorandum concerning the interview and documenting the reason for the "screen out". All VOSH-related allegations that are "screened out" for administrative reasons shall be recorded in IMIS/OIS.

- C. If the complainant refuses to accept this determination, the case will be docketed and subsequently dismissed. The VOSH Director will send the complainant a letter verifying administrative closure of the case.
 - 1. If a complaint filed against an employer is solely under the jurisdiction of OSHA, e.g. the complainant is a federal government employee, the complaint will be referred to the appropriate federal investigator or supervisor, and a record of the referral shall be maintained with the “screen out” records. Such referrals will not be docketed or entered into the IMIS/OIS.
- D. As part of the docketing procedures, when a case is opened for investigation, the Investigator will send a letter notifying the complainant that the complaint has been reviewed, given an official designation (i.e., case name and number), and opened for investigation. The name, address, telephone number and email address of the Investigator will be included in the docketing letter.
- E. Also at the time of docketing, or as soon as appropriate, the Investigator will prepare a letter notifying the respondent that a complaint alleging discrimination has been filed by the complainant and requesting that the respondent submit a written position statement. Failure to promptly forward the respondent letter could adversely impact the timely completion of the investigation.
 - 1. Designation of Representative Form must be included with this letter to allow the respondent the option of designating an attorney or other official representative.
 - 2. The respondent notification will be sent by certified mail, return receipt requested, or an equivalent service to provide a record of receipt. The tracking number will be identified in the file.
 - 3. Prior to sending the notification letter in a case where the complainant has made a VOSH complaint, the Investigator must first determine if a VOSH compliance inspection is pending. If such an inspection is pending, and the agency requests a short delay, the notification letter will not be mailed until such inspection has commenced in order to avoid giving advance notice of a potential inspection.
- F. During periods of heavy case loads, it may be appropriate to send the complainant a questionnaire for them to complete and return to the Investigator. Questionnaires may only be used with the explicit approval of the VOSH Director. The questionnaire must include any information already submitted by the complainant and be used only to obtain supplemental data. Questionnaires may not be used in lieu of signed statements. A sample questionnaire is attached.

IV. Timeliness of Filing.

- A. Discrimination complaints must be filed within the specified statutory time frame of sixty (60) days from the date when the adverse action takes place. If the discrimination is of a continuing nature, such as harassment or blacklisting, the time period begins when the last act of discrimination occurs. The first day of the time period is the day after the alleged adverse action. Generally, the date a complaint is considered filed is the day the complainant visits, emails, faxes or telephones a Virginia Department of Labor and Industry official. For complaints sent by

mail, the date filed is the date of the post mark. If the post mark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a federal holiday, or if DOLI Offices are closed, the next business day will count as the final day.

- B. Complaints filed after the sixty (60) day deadline will normally be closed without further investigation. However, there are certain extenuating circumstances which could justify tolling the statutory filing period for equitable principles. The general policy is outlined below, but each case must be considered individually.
- C. An investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of the following. (These circumstances are not to be considered all inclusive, and the reader should refer to current case law for further information.)
 - 1. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the discriminatory grounds for the adverse action.
 - 2. The employee is unable to file within the statutory time period due to debilitating illness or injury.
 - 3. The employee is unable to file within the required period due to a natural disaster, such as a snow storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.
- D. Conditions which will not justify extension of the filing period are, among others:
 - 1. Ignorance of the statutory filing period,
 - 2. Filing of unemployment compensation claims,
 - 3. Filing a workers' compensation claim,
 - 4. Filing a private negligence or damage suit,
 - 5. Filing a grievance or arbitration action, or
 - 6. Filing a discrimination complaint with a state plan state or another agency that has the authority to grant the requested relief.

V. Scheduling the Investigation.

- A. The Investigator will prepare a case file containing the original complaint and other evidentiary materials supplied by the complainant.
- B. The Investigator will generally schedule investigations in chronological order of the date filed, taking into consideration economy of time and travel costs, unless otherwise directed by the VOSH Director.

Chapter 3

Conduct of the Investigation

- I. **Scope.** This chapter sets forth the policies and procedures Investigators must follow during the course of a discrimination investigation. It does not attempt to cover all aspects of a thorough discrimination investigation, and it must be understood that due to the extreme diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. The Investigator should consult with the VOSH Director when additional guidance is needed.
- II. **Case File.**
- A. **Original Evidentiary Material.** The Investigator will compile a standard case file containing the Intake document and notes, copies of initial correspondence to the complainant and respondent, and any other evidentiary material initially supplied by the complainant.
- III. **Preliminary Investigation.**
- A. **When initially receiving the discrimination case,** it is important to confirm that the complaint is valid and is covered under Title 40.1 of the *Code of Virginia*. This initial review should confirm that the complaint is timely filed, that a *prima facie* allegation is present under the statute, and that the case has been properly docketed with notification to both parties.
- B. **The Investigator may also check on prior or current discrimination or safety and health cases** related to either the complainant or employer. Such information normally will be available from IMIS/OIS or the Regional Office, and can best be obtained by telephone or a personal visit. This enables the Investigator to coordinate related investigations and to obtain additional background data pertinent to the case at hand.
- Examples of information to be sought during the preliminary investigation research phase are:
1. Copies of safety and health or environmental complaints filed with VOSH/OSHA or other agencies.
 2. Safety and health or environmental enforcement actions, including inspection reports, which were recently taken against the employer.
 3. Copies of the safety and health or environmental inspector's notes.
 4. Interviews and signed statement of the inspector.
 5. Information on previous discrimination complaints.
- C. **Coordination with Other Agencies.** If information received during the investigation indicates that the complainant has filed a concurrent discrimination charge or a safety and health or environmental complaint with another government agency (such as OSHA, DOT, NLRB, EPA, NRC, FAA, DOE, etc.), the Investigator may wish to contact such agency to determine the

nature, status, or results of that complaint. This coordination may discover valuable information pertinent to the discrimination complaint, and may, in certain cases, also preclude unnecessary duplication of government investigative efforts.

IV. The Field Investigation. Investigators ordinarily will be assigned several complaints to be investigated concurrently. Efficient use of time and resources demand that investigations be carefully planned in advance.

A. Burden of Proof. In the course of any investigation it is important to bear in mind the elements of a violation and the burden of proof required of each party as if the case were being heard before a judge. It is on this basis that relevant and sufficient evidence should be identified and developed to reach an appropriate determination of the case. During all phases of the investigation, the Investigator must bear in mind and look for evidence dealing with the following elements of a violation:

1. **Protected Activity.** It must be established that the complainant engaged in activity protected by the statute under which the complaint was filed.
2. **Employer Knowledge.** The respondent must be shown to have been aware, or suspect, that the complainant engaged in protected activity.
3. **Adverse Action.** The evidence must demonstrate that the complainant suffered some form of adverse action, including but not limited to, discharge, demotion, reprimand, harassment, lay-off, failure to hire, or failure to promote.
4. **Nexus.** A causal link between the protected activity and the adverse action must be established. Nexus cannot always be demonstrated by direct evidence and may involve one or more of several indicators such as animus (exhibited animosity) toward the protected activity or safety and health; proximity in time between the protected activity and the adverse action (timing); disparate treatment of the complainant compared to other similarly situated employees; false testimony or manufactured evidence; and pre-textual defenses by the respondent, *etc.*
5. **Employer Defense.** After the *prima facie* case is established, the respondent must in order to prevail, produce some evidence that the adverse action was motivated by a legitimate non-discriminatory reason, *e.g.*, poor work, absenteeism, misbehavior, or economic lay off. If the respondent produces this evidence, VOSH or the complainant must show by a preponderance of the evidence that the real reason for the adverse action was the protected activity. This may be inferred by showing that the legitimate non-discriminatory reason was pre-textual, *e.g.*, the non-safety related misconduct did not occur; other employees engaged in similar misconduct known to management were not similarly punished (disparate treatment); the misconduct played no role in the adverse action, "but for" the protected activity the adverse action would not have occurred; or the misconduct was minor in nature.
6. **Dual Motive.** If it is determined that a respondent's adverse treatment of a complainant was motivated both by illegal and legitimate reasons, then the dual motive test becomes applicable. The dual motive analysis may be based on either direct or circumstantial evidence of a link between an improper motive and the challenged employment decision. Direct evidence is evidence which does not require any deductions or

inferences to establish the conclusion which is to be proven, such as statements by management that express hostility towards the complainant's protected activity.

"Circumstantial evidence" is not based on personal knowledge, but on other facts from which deductions are drawn which show indirectly the facts sought to be proved. An example of circumstantial evidence would be a respondent's statement which is shown to be false in a manner that supports the allegations of the complainant. Under the dual motive test, the respondent, in order to avoid liability, has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision despite the protected activity.

7. As a general rule, to successfully develop the essential elements of the case, the Investigator will:

- a. Determine the complainant's allegations,
- b. Corroborate the allegations through witnesses and other evidence,
- c. Determine the respondent's answer to the allegations and defenses,
- d. Corroborate the respondent's response,
- e. Determine the complainant's answer to the respondent's defense, and
- f. Corroborate the complainant's answer to resolve all discrepancies.

B. Initial Contact with Complainant. The initial contact with the complainant should be made as soon as possible after receipt of the case assignment. Contact should be made even if the Investigator's caseload is such that actual field investigation will be delayed.

- 1. Activity/Telephone Log.** All telephone calls made during the course of an investigation must be accurately documented in the activity/telephone log. Not only will this be a helpful chronology and reference for the Investigator or any other reader of the file, but the log may also be helpful to resolve any difference of opinion concerning the course of events during the processing of the case. If a telephone conversation with the complainant is lengthy and includes a significant amount of pertinent information, the Investigator should document the content of this contact in a "Memo to File" to be included as an exhibit in the case file. In this instance, the telephone log may simply show the nature and date of the contact, the number called, and the comment "See Memo."
- 2. Early Dismissal.** If the Investigator determines that the complainant does not have allegations which are appropriate for investigation under the statute, but may have a *prima facie* case under the jurisdiction of other governmental agencies, the complainant should be referred to those other agencies as appropriate for possible assistance.
- 3. Unable to Locate Complainant.** In situations where an Investigator is having difficulty locating the complainant to initiate or continue the investigation, the following steps must be taken:

- a. Telephone the complainant at different hours during normal work hours and in the evening.
- b. Mail a certified, return-receipt-requested letter to the complainant's last known address requesting that the Investigator be contacted within 10 days of the receipt of the letter or the case will be dismissed. If no response is received within 10 days, the VOSH Director may terminate the investigation and dismiss the complaint.

C. Field Investigation. If, after the initial telephone contact with the complainant, it appears that the complainant has presented a *prima facie* allegation, the Investigator will proceed with a field investigation. Personal interviews and on-site collection of documentary evidence will be conducted when practical. Investigations should be planned in such a manner to personally interview all appropriate witnesses during a single site visit. In limited circumstances, testimony and evidence may be obtained by telephone, mail, or electronically. If a conversation is recorded electronically, the Investigator must be a party to the conversation, and the witness must have given prior consent to the recording. The consent should be acknowledged at the beginning of the recording. This does not apply to other tape recordings supplied by the complainant or witnesses; however, all electronically recorded interviews or other voice recordings must be transcribed if they are to be used as evidence.

D. Complainant Interview. The Investigator will arrange to meet with the complainant as soon as possible in order to interview and obtain a signed statement detailing the complainant's allegations. Such a record is highly desirable and useful for purposes of case review, subsequent changes in the complainant's status, possible later variations in testimony, and documentation for potential litigation. The complainant may, of course, have an attorney or other personal representative present at any time.

1. If, at this point or at any later stage in the investigation, it can be conclusively shown that a *prima facie* case cannot be developed, the investigation will be terminated.
2. The complainant's side of the investigation must be developed as thoroughly as possible. When writing the complainant's statement, it is usually practical to organize the testimony in a chronological order, outlining pertinent data and events from the time of the employee's hiring through the date of the adverse action, as well as subsequent developments. While much care should be taken to cover the essential elements of a discrimination case as outlined above, the complainant should be encouraged to talk freely about his/her concerns and experiences on the job, as important information may be revealed that might be missed in a generic "investigative outline" style of interview. An interview is an interactive process of questions and answers. A complainant or witness should not be instructed to submit a statement or fill out a questionnaire without engaging in this process.
3. The complainant should be encouraged to identify as many witnesses as possible, including names, home addresses, and phone numbers if available, as well as a summary of specifically what each witness might be able to testify to in support of the complainant's allegations.
4. The complainant must be requested to furnish all documentation in his/her possession relevant to the case. Such documentation might include:

- a. Copies of any discharge notices, reprimands, warnings or personnel actions,
 - b. Performance appraisals,
 - c. Earnings and benefits statements,
 - d. Grievances,
 - e. Unemployment benefits claims and determinations,
 - f. Job position descriptions,
 - g. Company employee and policy handbooks,
 - h. Copies of any charges or claims filed with other agencies or personal attorneys,
 - i. Medical records, or
 - j. Collective bargaining agreements.
5. It should be ascertained during the interview what restitution the complainant is seeking. If terminated or laid off by the respondent, the complainant should be advised of his/her obligation to search for work and to keep records of interim earnings. Failure to do so might result in a reduction of any back pay to which the complainant might be entitled in the event of future settlement or litigation, should the case be found meritorious. The complainant should be advised that the respondent's back pay liability ordinarily ceases when the complainant refuses a *bona fide*, unconditional offer of reinstatement. The complainant should also be advised to retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.
6. If, in unusual circumstances, the complainant is not personally interviewed and his/her statement is taken telephonically, a detailed Memo to File will be prepared relating the complainant's testimony. If necessary, this information may be transferred to an official statement form, and mailed to the complainant with instructions to review the document carefully, make any necessary corrections or additions, sign and return. Cases recommended for litigation must have in-person interviews of the complainant and pertinent witnesses in order to assess credibility and demeanor, and to ensure availability and willingness of witnesses to testify.

E. Contact Respondent.

1. Oftentimes, after receiving the notification letter that a complaint has been filed, the respondent may call the Investigator to discuss the allegation or inquire about the investigative procedure. The call should be noted in the case diary log, and if pertinent information is conveyed during this conversation, the Investigator should document such in the telephone log or in a Memo to File.

2. In many cases following receipt of the notification letter, a respondent will forward a written position statement, which may or may not include supporting evidence. In some instances, the material submitted may be sufficient to adequately document the company's official position. Assertions made in the respondent's position statement do not constitute evidence, and generally, the Investigator will still need to contact the respondent to interview witnesses, review records and obtain documentary evidence, or to further test respondent's stated defense.
3. If the respondent requests time to consult legal counsel, the Investigator will advise that future contact in the matter will be through such representative. The Designation of Representative form should be completed by counsel to document his/her involvement.
4. In the absence of a signed Designation of Representative, the Investigator is not bound or limited to making contacts with the respondent through any one individual or other designated representative (e.g., safety director) with the exception of legal counsel, as noted above. If a position letter was received from the respondent, the Investigator will contact the person who signed the letter.
5. The Investigator should interview all company officials who have known direct involvement in the case and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually to obtain the best testimony.
 - a. In this regard, if the respondent has designated an attorney to represent the company, interviews with management and supervisory officials should ordinarily be scheduled through the attorney, who may be present during any interviews of the management and supervisory witnesses.
 - b. Respondent's attorney does not, however, have the right to be present, and should not be present, during interviews of non-management or non-supervisory employees.
 - c. Any respondent may, of course, have a personal representative or attorney present at any time.
6. While at the respondent's establishment, the Investigator should make every effort to obtain copies of, or at least review and make notes on, all pertinent data and documentary evidence which respondent offers and which the Investigator construes as being relevant to the case.
7. If at any time during the initial (or subsequent) meeting with respondent, management officials, or counsel, respondent suggests the possibility of an early resolution to the matter, the Investigator should immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded.
8. If necessary, interrogatories may be issued for information or records when conducting an investigation in accordance with Title 40.1-6(4). The Commissioner also has the authority under the same section to take and preserve testimony, examine witnesses and administer oaths. The investigator shall consult DLS for guidance.

9. If the respondent fails to cooperate or refuses to respond, the Investigator will evaluate the case and make a determination based on the information gathered during the investigation.

F. Early Joint Review with the DLS. If in the early stages of the investigation, where the Investigator and the VOSH Director believe there is evidence that the complainant's allegation has merit and may not be easily settled, DLS should be contacted and briefed on the case.

1. Early DLS involvement will help direct the course of the investigation, and ensure that proper documentation is gathered to help the DLS in a successful litigation.
2. With DLS assurance that the case will likely go forward, the Investigator may take a stronger position with the respondent during investigative meetings or the closing conference and negotiate a better settlement.
3. Of equal importance in this "pipeline" procedure are those cases which the Investigator or VOSH Director thinks are worthy, but which DLS believes are not suitable for litigation. Early discussion may resolve the differences and prevent needless review of the case. This may also obviate the need for further investigative efforts if the case is considered inappropriate for litigation, thus precluding unnecessary expenditure of government resources and a speedier conclusion of the investigation.

G. Further Interviews and Documentation. It is the Investigator's responsibility to fairly pursue all appropriate investigative leads which develop during the course of the investigation, with respect to both the complainant's and the respondent's positions. Contact must be made whenever possible with all relevant witnesses, and every attempt must be made to gather all pertinent data and materials from all available sources.

1. The Investigator must attempt to obtain a signed statement from each relevant witness. Witnesses will be interviewed separately and privately to avoid confusion and biased testimony, and to maintain confidentiality. The respondent has no right to have a representative present during the interview of a non-managerial employee. If witnesses appear to be "rehearsed," intimidated, or reluctant to speak in the workplace, the Investigator may decide to simply get their names and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may have a private attorney or other personal representative present at any time provided that they have no ties to the respondent.
2. In the event that a witness refuses to sign a statement, interview notes shall be taken. The witness shall be asked to review the notes and verbally acknowledge the accuracy of the notes and be given the opportunity to make any corrections. When the witness acknowledges the accuracy of the final notes, this fact shall be confirmed in writing by the Investigator on the document.
3. The Investigator will attempt to obtain copies of appropriate records and other pertinent documentary materials as required. If this is not possible, the Investigator will review the documents, taking photographs of the documents or notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during litigation.

4. In cases where the complainant is covered by a collective bargaining agreement, the Investigator should interview the appropriate union officials, and obtain copies of grievance proceedings or arbitration decisions specifically related to the discrimination case in question.
 5. When interviewing potential witnesses (other than officials representing the respondent), the Investigator should explain the extent of confidentiality permitted by law. Non management and non supervisory employee statements shall be considered confidential. The Investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if the case is brought to court, a judge may order the statement to be disclosed.
- H. Resolve Discrepancies.** After completing the respondent's side of the investigation, the Investigator will again contact the complainant and other witnesses as necessary to resolve any discrepancies or counter allegations resulting from contact with the respondent.
- I. Analysis.** After having gathered all relevant evidence available, the Investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in subparagraph A above.
- J. Closing Conferences.** Upon completion of the field investigation, and after review of the case by the VOSH Director, the Investigator will conduct a closing conference with the complainant. This conference may be conducted with the complainant in person or by telephone. The Investigator should bear in mind that a thorough, tactful closing conference is considered a very important and valuable step to achieve a successful conclusion to the investigation. Assuring the complainant that his or her concerns have been fully explored and the investigative findings impartially evaluated will minimize the likelihood of appeals or objections, even though the complainant may not be totally satisfied or in agreement with the determination.
1. During the conference, the Investigator will discuss the case with the complainant, allowing time for questions and explaining how the recommended determination of the case was reached and what actions may be taken in the future.
 2. It is unnecessary and improper to reveal the identity of witnesses interviewed. If the complainant feels that certain witnesses should have been interviewed but were not, the Investigator will explain why the witnesses may not have been interviewed.
 3. If the complainant attempts to offer any new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant, or might change the recommended determination; and, if so, what further investigation might be necessary prior to final closing of the case. Should the Investigator decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair decision on the case's merits, this should be explained to the complainant along with an explanation of why additional investigation does not appear warranted.
 4. During the closing conference, should the VOSH Director determine that the complaint will not be pursued further, the Investigator must inform the complainant of his/her rights under Title 40.1-51.2:2.B. of the *Code of Virginia* to file an action in the circuit court against his/her employer for appropriate relief, and without VOSH involvement.

5. The closing conference will be documented in the case file either by an entry in the case diary log or a separate Memo to File.

K. Document File. With respect to any and all activities associated with the investigation of a case, Investigators must continually bear in mind the importance of documenting the file to support their findings. Time spent carefully taking notes and writing memoranda to file is considered productive time and can save hours, days, and dollars later when memories fade and issues become unclear. To aid clarity, documentation should be arranged chronologically where feasible.

Chapter 4

Case Disposition

I. Scope.

This chapter sets forth the policies, procedures and format for writing the Final Investigation Report (FIR). It includes procedures for arriving at a determination on the merits of a discrimination case; policies regarding withdrawal, settlement, dismissal, and litigation; adequacy of remedies; and tracking procedures for timely completion of cases.

II. Preparation.

A. Investigator Reviews the File. After completing the investigation, the Investigator must thoroughly review the file and its contents to collate and organize all pertinent data in preparation for writing the Final Investigation Report (FIR). When appropriate, the Investigator may wish to discuss the case with the VOSH Director prior to writing the FIR.

III. Final Investigation Report.

The Investigator will report the results of the investigation by means of the Final Investigation Report following the policies and format described in Chapter 5 of this Manual.

IV. Case Review and Recommendation by the VOSH Director.

A. Review. Upon receipt of the completed investigation case file from the Investigator, the VOSH Director will review the file to ensure technical accuracy, thoroughness of the investigation, applicability of law, completeness of the report, and merits of the case.

If legal action is being considered, the VOSH Director will review the recommendation for consistency with legal precedents and policy impact. Such review will be completed as soon as practical after receipt of the file.

B. Recommendation. If the VOSH Director concurs with the analysis and recommendation of the Investigator, the concurrence will be documented by a concurrence block at the end of the FIR, and appropriate determination letters will be prepared for the VOSH Director's signature.

1. **Withdrawal.** For recommendations to approve withdrawal, the VOSH Director will approve by signature on the withdrawal form. In cases where the complainant has failed to return a signed withdrawal form, the disposition letter to the complainant must clearly indicate that the disposition of the case is based on the complainant's verbal request for withdrawal.
2. **Dismissal.** For recommendations to dismiss, the Investigator will draft letters of dismissal for the VOSH Director's signature to the complainant with a copy to the respondent. The letters must include the necessary information regarding the parties'

rights to pursue the matter in circuit court without VOSH involvement, pursuant to Title 40.1-51.2:2.B of the *Code of Virginia*.

3. **Settlement.** For recommendations to approve settlement, the VOSH Director will approve by signature on the Settlement Agreement. The VOSH Director will also ensure that signed closure letters are sent to the complainant and respondent along with copies of the settlement agreement, the Notice to Employees, the back pay check, etc.
4. **Deferral.** For recommendations to defer to another agency decision or private settlement, the Investigator will draft letters of deferral to the complainant for the VOSH Director's signature, sending a copy to the respondent.
5. **Merit Finding.** For recommendations of merit, the Investigator will draft a memorandum from the VOSH Director to DLS recommending litigation.
6. **Further Investigation Warranted.** If, for any reason, the VOSH Director does not concur with the Investigator's analysis and recommendation or finds that additional investigation is warranted, the VOSH Director will return the file for follow-up work.

V. **Determination.**

All letters of determination to both the complainant and respondent must be sent by certified mail, return receipt requested, or an equivalent service.

VI. **Approval for Litigation.**

Cases recommending litigation will be forwarded to DLS for review. If DLS determines that additional investigation is required, the VOSH Director will assign such further investigation to the original Investigator.

Chapter 5

Report Writing and Case File Documentation

I. **Scope.**

This chapter sets forth the policies, procedures, and format for writing the Final Investigation Report (FIR) and for properly organizing and documenting the investigative case file.

II. **Screened Complaints.**

In cases which are not docketed after the initial screening, the file arrangement of materials, as outlined below, need not be followed. Rather, a memorandum to file will be prepared documenting the discussion with the complainant and the reasons why the case is not appropriate for investigation. The memorandum will be maintained with the “screen-out” log, and an Intake screening record will be entered into IMIS/OIS. If the complainant refuses to accept this determination, the case will be docketed and subsequently dismissed. Initial letters will be prepared and sent to both parties and they should include an explanation for the dismissal and inform the complainant of their rights to pursue a private right of action pursuant to Title 40.1-51.2:2B of the Code of Virginia.

III. **Case File Organization.**

- A. As part of the case docketing process, the Investigator will prepare an original case file for each docketed case.
- B. Upon assignment, the Investigator normally compiles a standard case file containing the Intake screening sheet, screening notes, transmittal documents, assignment memorandum, copies of correspondence to the complainant and respondent, and any evidentiary material initially supplied by the complainant. The file will be organized and maintained in a four-section folder. The VOSH Director shall determine the appropriate manner in which case files shall be organized. A Table of Contents, identifying all the evidentiary material, must be placed on top to aid review of the case file.

IV. **Final Investigation Report (FIR).**

- A. **Effective Communication.** One of the primary skills required of an investigator is the ability to present the investigative findings in a clear and succinct manner that effectively communicates the results of the investigation to the reader of the report. The general format of the FIR should be logical, and all of the information listed below shall be included, where appropriate. It shall be a memorandum addressed to the VOSH Director.
- B. **FIR Format.** Information to be included in the FIR is as follows:
 - 1. **Date Complaint Filed.** Indicate the actual date that the complaint was filed.
 - 2. **Complainant.** Include full name, mailing and street address, telephone number, fax number, and e-mail address of the complainant.
 - 3. **Represented by.** Identify the complainant’s attorney or other designated representative,

mailing address, telephone number, fax number, and e-mail address, if applicable.

4. **Respondent.** Include the full name, mailing and street address, telephone number, fax number, and e-mail address of the respondent.
5. **Represented by.** Identify the respondent's attorney or other designated representative. Include name, title, mailing address, telephone number, fax number, and e-mail address, if applicable.
6. **Allegation.** Give a brief account of the complainant's allegations; *e.g.*, "Complainant alleges she was discriminatorily discharged for refusing to work on an unsafe scaffold."
7. **Defense.** Give a brief account of the respondent's defense; *e.g.*, "Respondent claims the complainant was discharged for excessive absenteeism."
8. **Coverage Data.** Give a description of the company to include location of main offices, nature of primary business.
9. **List of Witnesses.** List name, occupation, mailing and street address and telephone number of all witnesses interviewed, and list other known potential witnesses who were not interviewed.
10. **Investigative Findings.** The Investigative Findings section should begin with descriptive background information on the work site and history of VOSH/OSHA safety and health activity, if any, and flow from there through the events relating to the alleged discrimination. The findings should be written in a narrative, "storytelling" format. References should be made to the exhibit numbers of relevant information (and the location of the information within the exhibit, if necessary). References should be given with sufficient frequency to permit a reviewer of the file to easily locate the evidence supporting the findings. All exhibits should be referenced at some point in the Investigative Findings, or their relevance to the case should be questioned. Please see the example FIR at the end of this chapter.
11. **Analysis/Conclusions.** Evaluate the facts presented in the Investigative Findings as they relate to the four elements of a violation. Questions of credibility and reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented. In cases recommending litigation, a discussion of the strengths and weaknesses of the case *vis-à-vis* respondent's possible defense should also be presented, as appropriate. Discuss the adequacy of the facts, legal principles involved, and anticipated trial problems.
12. **Recommendation.** Give the Investigator's recommendations for disposition of the case.

V. **Closing Conferences.** Closing Conferences should be documented in the case diary log, or a memo to file. Include the date and time of the conference, the reasons given for a positive or negative finding, a description of the party's reactions to the findings, and any attempt by the party to offer any new evidence or witnesses. If the case is recommended for dismissal, mention that private right of action procedures were explained. If the case was settled, a description of the settlement should be presented in lieu of the closing conference. Closing conferences may be conducted with the complainant in person or by telephone. If the complainant cannot be contacted by telephone, a letter will be mailed with instructions for the complainant to call the Investigator so that a proper conference can be held.

Chapter 6

Settlement Agreements

- I. **Scope.** This section covers policy and procedures for the effective negotiation and documentation of settlement of meritorious cases at the Regional level.
- II. **Settlement Agreement Policy.** It is VOSH policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Further, although VOSH will not, itself, seek settlement of cases in which a merit finding has not been reached, VOSH will make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation.
- III. **Early Voluntary Resolution.**
 - A. Ideally, as with safety and health issues, employer/employee disputes should be resolved between the principals themselves to their mutual benefit without third-party interference. The Commissioner favors voluntary resolution of disputes through alternative dispute resolution processes. It is also VOSH policy to defer to adequate privately negotiated settlement of such disputes, although such settlements must still be reviewed and approved by the VOSH Director to ensure that the terms of the settlement are consistent with the purpose and intent of the Labor Laws of Virginia.
 1. If the complainant and respondent settle the dispute between themselves or if settlement is reached through the grievance-arbitration process or other means prior to VOSH reaching a determination, the case may be concluded in one of two ways.
 - a. The complainant may wish to withdraw the complaint.
 - b. The VOSH Director may issue a determination letter deferring to the outcome reached among the parties.
 2. In either event, the case will be recorded in the IMIS/OIS as “Settled - Other”.
 - B. On the other hand, VOSH should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.
- IV. **Settlement Agreement Procedure.**
 - A. **Requirements.** Requirements for all settlement agreements are:
 1. The investigative case file must address all elements of a *prima facie* allegation.
 2. The file must list all appropriate relief at that juncture of the process and the relief obtained.
 3. The settlement must contain all of the following core elements of a settlement agreement:

- a. It must be in writing.
 - b. The employer must agree to comply with the relevant statute(s).
 - c. It must address alleged retaliation.
 - d. It must specify the relief obtained.
 - e. It must address a constructive effort to alleviate the chilling effect, such as the posting of the agreement or an equivalent notice, or fully explain why notice to remaining employees is not necessary.
4. Adherence to these "core" elements should not create a barrier to getting an early settlement and adequate remedy for the complainant, and concessions may sometimes be made. Exceptions to the above policy are allowable if approved in a pre-settlement discussion with the VOSH Director.
- a. All appropriate relief/damages to which the complainant is entitled must be documented in the file. If the settlement does not contain a make whole remedy, justification for such and the complainant's concurrence must be noted in the file and the Final Investigation Report.
 - b. In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action had on co-workers. Posting of the settlement agreement or a notice to employees may be a remedy, but may also be an impediment to a settlement. A respondent's refusal to post such a notice should not be allowed to prevent the achievement of an otherwise satisfactory agreement. Other efforts to address the chilling effect, such as company training, may be available and should be explored.

B. Adequacy of Settlements.

1. **Full Restitution.** Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each individual meritorious case must be carefully explored and documented by the Investigator. One hundred percent relief should be sought during settlement negotiations wherever possible. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass any or all of the following, and is not necessarily limited to:
- a. Reinstatement to the same or equivalent job, including restoration of accumulated seniority and benefits. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.
 - b. Wages lost due to the adverse action. (*NOTE: Unemployment compensation benefits may not be considered as a back pay offset.*)
 - c. "Front pay" is a term covering wage losses from the last date at which back wages are calculated to an agreed future date. Front pay may be used in lieu of reinstatement where an employer wishes to avoid reinstatement and the employee agrees (or the reverse). Absent the agreement of the employer, an

employee typically is only entitled to front pay where the employment relationship is so poisoned that no reasonable person could return to work (like constructive discharge).

- d. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity which may have been placed in the complainant's personnel file.
- e. Respondent's agreement to provide to the complainant a neutral reference to potential employers.
- f. Posting of a notice to employees indicating that the respondent agreed to comply with the statute and that the complainant has been awarded appropriate relief.
- g. Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit-sharing losses, property loss resulting from missed payments.
- h. Pain and suffering. Such damages need some factual support, such as medical bills, the loss of a home, etc.
- i. One lump sum payment to be made at the time of the signing of the settlement agreement as agreed by the parties.

2. Punitive Damages.

- a. Punitive damages should be considered whenever a management official involved in the adverse action knew about the statute before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages should also be considered when the respondent's conduct is egregious, e.g., when a discharge is accompanied by previous harassment or subsequent blacklisting, or when there has been a pattern or practice of retaliation in violation of the laws protecting employees from discrimination within VOSH scope of authority.
- b. When an investigation uncovers evidence which could lead to a recommendation for punitive damages, the Investigator should advise the VOSH Director as soon as possible in order to alert DLS of the egregious nature of the potential violation. If DLS agrees that such damages may be appropriate, further development of evidence should be coordinated with the DLS.

3. Unilateral Settlement Agreements. When the complainant does not agree to become a party to a settlement which, in the VOSH Director's opinion, is a fair and equitable settlement of all matters at issue and would effectuate the requirements of Title 40.1 of the *Code of Virginia*, settlement agreements may be effected between VOSH and respondents without the consent of the complainant. All unilateral settlement agreements must be personally reviewed and approved in writing by the Commissioner of the Virginia Department of Labor and Industry.

C. Front Pay. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.

D. Documentation.

1. Although each agreement will, by necessity, be different in detail, the general format and wording of the sample agreements will be used.
2. Investigators will document in the file, and reference in the FIR, justification for the restitution obtained. If the settlement falls short of a full remedy, reasons for such must be explained, along with an explanation that the complainant is aware of his or her entitlement and has chosen to accept a lesser amount.
3. Back pay computations must be included in the case file, and referenced in the FIR, with explanations of calculating methods and relevant circumstances as necessary.

E. Enforcement. In all cases where there has been a settlement, either before or after the issuance of findings, and the employer fails to comply with the settlement, this failure may be treated as a new instance of retaliation and require the opening of a new case or it may be appropriate to confer with DLS to consider the possibility of issuing findings in the original case or direct enforcement of the settlement agreement, itself, in court. Depending on the nature of the case, one or the other option might be preferable.

Chapter 7

VOSH Relationship with OSHA

I. Relationship to OSHA.

- A. Section 18 of the OSH Act provides that any state which desires to assume responsibility for development and enforcement of occupational safety and health standards must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Approval of a state plan under Section 18 does not affect the Secretary of Labor's authority to investigate and enforce Section 11(c) of the Act in any state. However, 29 CFR 1977.23 and 29 CFR 1902.4(c)(2)(v) require that each state plan include an anti-discrimination provision as effective as OSHA's Section 11(c). Therefore, in state plan states, employees may file occupational safety and health discrimination complaints with either federal OSHA or the state or both.
- B. The regulation at 29 CFR 1977.23 also provides that OSHA may refer complaints of employees adequately protected by state plans to the appropriate state agency. It is OSHA's policy to refer all Section 11(c) complaints to the appropriate state plan where it has been determined that the state's discrimination program is operating effectively to adequately protect the employees. A state plan state's jurisdiction extends to employees of all private sector employers who are subject to the state's occupational safety and health standards enforcement program as well as to all state and local government employees. Complaints filed under the other whistleblower statutes are under exclusive federal OSHA jurisdiction and may not be referred to the states.
 - 1. Complaints received by VOSH which are not under state plan jurisdiction will be referred to OSHA by means of a referral letter, email, or documented telephone call. The complainant will also be advised of the referral in the same manner.
 - 2. These referrals will be documented on the screen-out log, and maintained for reference.
 - 3. VOSH must advise complainants of their right to file a federal complaint if they wish to maintain their rights to concurrent federal protection. This will be accomplished in the initial letter to the complainant.

APPENDICES:

OTHER DOCUMENTS

COMMONWEALTH of VIRGINIA
Department of Labor and Industry

Designation of Representative

Complainant	
v.	Case Number:
Respondent	

TO: *(Name of Discrimination Investigator)*
Main Street Centre
600 East Main Street, Suite 207
Richmond, Virginia 23219
(804) 371-4995

The undersigned hereby enters his appearance as representative of:

In the above matter:

<div style="border-bottom: 1px solid black; margin-bottom: 10px;"></div> Signature of Representative	Representative's Address and ZIP Code
<div style="border-bottom: 1px solid black; margin-bottom: 10px;"></div> Type or Print Name	
<div style="border-bottom: 1px solid black; margin-bottom: 10px;"></div> Title	<div style="border-bottom: 1px solid black; margin-bottom: 10px;"></div> Telephone Number
<div style="border-bottom: 1px solid black; margin-bottom: 10px;"></div> Date	<div style="border-bottom: 1px solid black; margin-bottom: 10px;"></div> e-mail address

October 12, 2010

UPS Delivery

William E. Coyote
1234 Warner Blvd
Richmond, VA 23219

RE: Discrimination Complaint against ACME Corporation

Dear Mr. Coyote:

This letter is to acknowledge receipt of your complaint of discrimination under Virginia Code § 40.1-51.2:1 (copy attached). Please save any evidence and prepare a list of names, addresses, and telephone numbers of potential witnesses. Provide this information and any documentation (notes, discharge slips, performance evaluations, etc.) to me by **November 2, 2010**. You may email this information to Discrimination Investigator's first.name.last.name@doli.virginia.gov. **Failure to provide this information by the requested date could result in our closing our files on this matter. No reminders will be sent to you.**

A preliminary inquiry will determine if there is a basis for further investigation. If further proceedings are warranted, we will conduct a formal investigation into your complaint. At the conclusion of the investigation, a determination will be made on the merits of your case. If your complaint is found meritorious, an attempt will be made to resolve the complaint with a voluntary settlement agreement. If we are unable to resolve the complaint voluntarily, § 40.1-51.2:2 of the *Code of Virginia* provides that the Commissioner shall bring the case to court. The **burden of proof** to support a charge filed under § 40.1-51.2:2 of the *Code of Virginia* **is on the charging party**. If a charge cannot be supported, your complaint will be dismissed, and you will be informed of the reason.

Please be advised that you have dual filing rights with Federal OSHA. If you wish to also file a complaint with Federal OSHA, you will need to contact them within thirty (30) days from the date of the adverse action. Their number in Philadelphia is (215) 861-4900.

Should you have any questions or require additional information, please feel free to contact me at (804) 371-4995 between 7:30 a.m. and 4:00 p.m.

Sincerely,

Discrimination Investigator

Attachment (Copy of Code Section)

October 12, 2010

UPS Delivery

Elmer J. Fudd, President
ACME Corporation
6789 Animation Lane
Richmond, VA 23219

RE: Claim of discrimination filed by William Coyote

Dear Mr. Fudd:

This is to inform you that a complaint was filed with this office on October 12, 2010, by William Coyote, alleging that a violation of **§40.1-51.2:1 of the Code of Virginia** has occurred. Mr. Coyote alleges that he was terminated for expressing an occupational safety and health complaint to management regarding asbestos exposure in the workplace. Mr. Sutton stated that he was employed by ACME Corporation at a warehouse in Richmond, Virginia.

This is not a decision by this office that a violation has occurred. We are acting as neutral fact finders and are required to investigate the allegation. Your cooperation with this office is invited so that all the facts of the case may be considered.

Since it is in the best interest of all concerned to resolve such allegations as quickly as possible, please feel free to contact me to discuss the details and remedial options available to you in such cases. Voluntary adjustments of complaints may be affected by the way of a Predetermination Settlement Agreement. If a full investigation is completed and it is determined that **§40.1-51.2:1** of the *Code of Virginia* has been violated, we would seek a remedy consistent to that provided in the enclosed sample Settlement Agreement. If the investigation revealed reasonable cause to believe that the code has been violated and we are unable to resolve the complaint with a voluntary settlement agreement, **§40.1-51.2:2.A.** of the *Code of Virginia* provides that the Commissioner *shall bring the case to court*. On the other hand, if a full investigation revealed insufficient proof of a violation of **§40.1-51.2:1** of the *Code of Virginia*, the complaint will be dismissed by this office. Please be advised that even though we may dismiss a complaint, **§40.1-51.2:2.B.** of the *Code of Virginia* gives an employee the right to take the case to court against you for appropriate relief. If you wish to discuss an early resolution (sample enclosed) to this, please contact me by letter, or telephone (804) 371-4995, fax (804) 371-6524 or via email at Discrimination Investigator's first.name.last.name@doli.virginia.gov.

If you are not interested in a *no-fault resolution without an investigation*, please provide a written summary of events involving the named complainant, including his/her job activities, and the events leading up to the adverse action which precipitated this complaint. This written response should be filed by **November 2, 2010**. If no response is received from you by that date, a determination on the merits of this complaint will be made based upon the information obtained from the complainant. You should include any documentation or affidavits relevant to this matter. Affidavits of non-management employees must be voluntarily given by such employees. Please note that the affidavits must contain an acknowledgment by the affiant in the following language:

"I have been informed that Va. Code §40.1-51.4:2 provides for a criminal fine of not more than \$10,000.00 and/or for imprisonment for not more than six months, or both, for any person who knowingly makes any false statement in a document filed with the Department of Labor and Industry."

Please be advised that if your response lacks sufficient information to permit a determination or if we have additional questions, the Department reserves the right under **§40.1-49.8** of the *Code of Virginia* to conduct, without prior notice, an on-site investigation into the matter.

Although an effort has been made to be as comprehensive as possible, this request is not to be considered all-inclusive. We may see additional information or pursue other avenues of inquiry as may be deemed appropriate.

Your cooperation and assistance in this matter is sincerely appreciated.

Sincerely,

Discrimination Investigator

Attachments

INTAKE SCREENING SHEET

Date of Screening:	10/12/2010
Intake Person:	(<i>Discrimination Investigator's Name</i>)
Allegation:	Terminated for expressing concern about disturbed asbestos containing material in the workplace
Complainant's Name and Address:	William E. Coyote 1234 Warner Blvd., Richmond, VA 23219
Complainant's Telephone:	804 371 4995
Respondent's Name:	ACME Corporation
Respondent's Telephone:	804 786-7776
Mailing Address	6789 Animation Lane Richmond, VA 23219
Site Address (if different)	
Highest Official in Company:	Elmer J. Fudd President
Type of Business:	Distributor of roadrunner trapping devices
SIC Code/ NAICS	5432 765123
Hours of Operation:	0600-2200
Number of Employees:	9
Union/Non-Union:	NON
Grievance Filed w/Union:	N/A
Complainant's Title:	Quality Assurance Technician
Complainant's Duties:	Testing products and ensuring standards of production are met
Supervisor's Name:	Samuel Yosemite
Supervisor's Title:	Shift Supervisor
Rate of Pay/Hours Per Week:	\$22.60/hr 8 hrs/day 5 days week
Date of Hire:	November 14, 1994
Date of Adverse Action:	October 4, 2010
60th day from Adverse Act	12/4/2010
Reason Given for Adverse Action:	Misconduct-stemming from allegations that I demonstrated episodes of outrageous behavior towards customers and coworkers. Cussing, slamming telephone and clipboard, kicking furniture.
Settlement Desired:	Reinstatement with restoration of pay and benefits
Allegation Summary:	
	Complainant states that he was terminated for trying to get the company to have some suspected asbestos containing material tested and removed or secured if necessary.

Notes:

Caller stated that he did cuss at people and occasionally kick furniture while yelling, but he did not slam

a clipboard down. Caller stated that he knows his asbestos complaint got him fired because it happened three days after his complaint to his supervisor, and subsequent email to the corporate human resources manager that also handles safety.

November 5, 2010

UPS Delivery

William E. Coyote
1234 Warner Blvd
Richmond, VA 23219

RE: Discrimination Complaint against ACME Corporation

Dear Mr. Coyote:

We have received a response from ACME Corporation in response to your allegation. Mr. Fudd indicates in his letter (*copy enclosed*) that you were not terminated for expressing an occupational safety and health concern, but instead you were suspended for legitimate, non-discriminatory reasons and you then failed to attend a scheduled conference with supervisors. The Respondent contends that you were not excused from the meeting, and you did not attempt to explain your absence. The Respondent considered your absence at the meeting an abandonment of your employment.

I am including a copy of Mr. Fudd's response for your review and comment. If you wish to comment, please do so in writing by November 26, 2010. If I do not receive any comments from you, I will submit the facts as I have received them for a decision on the matter.

Please be advised that under §40.1-51.2:1 of the *Code of Virginia*, an employer is prohibited from discharging or discriminating in any way against any employee who has filed a safety and health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of Virginia law. To prove a case under this section, we must show that the employee engaged in some activity protected under this Title and that the employer knew of this protected activity. The employer must have then discharged or discriminated against the employee because of that activity.

Sincerely,

Discrimination Investigator

Attachment

CASE DIARY LOG
DISCRIMINATION



RESPONDENT:

COMPLAINANT:

Date/Time	Action	Initials
		TBF

Virginia Department of Labor and Industry
Occupational Safety & Health Enforcement
Main Street Centre
600 East Main Street, Suite 207
Richmond, VA 23219-4101
Telephone: (804) 371-4995
FAX: (804) 371-6524
Email: Discrimination Investigator's first.name.last.name@doli.virginia.gov

COMPLAINANT FOLLOW-UP QUESTIONNAIRE

The following questionnaire needs to be filled out by all complainants alleging that discriminatory action has been taken against them. You may also submit copies of any documentation, such as: (1) discharge slips, (2) pay stubs, (3) performance evaluations, and/or any other evidence which you believe support your claim. Please note that failure to return this completed form to the address noted above may result in a delay of our investigation and closing of your file.

Please print in black or blue ink

1. Complainant Information: (Please notify this office immediately of any change)

Name: _____
Address: _____

Contact Telephone: _____
Number: _____
Email Address: _____

2. Respondent (Employer) Information:

Company Name: _____
Address: _____

Company Representative: _____
Contact Telephone Number: _____
Email address: _____

3. How many employees work at this company or job site:

4. What kind of business is this, e.g., manufacturer, construction, shipping, transportation, agriculture?

5. Do you belong to a Union? If so, what is the Name, Local, and Representative name and telephone number?

-
-
6. What was the first date of your employment? _____
7. What was your last date of employment, if applicable? _____
8. What was your job title? _____
9. Briefly describe your job duties and responsibilities:

10. What type of adverse action was taken against you, e.g., termination, suspension, lay-off?

11. What was the date of this adverse action? _____
12. In your opinion, why did your employer take adverse action against you? _____

13. What was your final wage rate? \$ _____ per (Circle one) Hour / Week / Month / Year
14. What was the average number of hours that you worked per week? _____
15. What is the name and job title of your immediate supervisor: _____

16. Did VOSH (or other agency) conduct an inspection at your work site? If so, what was the date of the inspection, and its outcome?

17. If you refused to do a work assignment, describe WHY you refused to do it, and what assignment did you refuse to do:

18. Have you worked since leaving this employment? If so, where? _____

19. Have you looked for another job since leaving this employment? Circle one: **YES NO**

20. What will the employer say is the reason the adverse action was taken against you? _____

21. If your employment was terminated, are you interested in returning to work for your previous employer?
Circle one: **YES** **NO**
22. In the box below, list names, telephone numbers and email addresses of witnesses who can support your claim. Be sure to print clearly or submit by email:

<u>Witness Name</u>	<u>Telephone Number with Area Code and Email address</u>

Attach additional sheets if more space is required

Sections of the *Code of Virginia* Applicable to VOSH Discrimination

§ 40.1-51.2:1. Discrimination against employee for exercising rights prohibited.

No person shall discharge or in any way discriminate against an employee because the employee has filed a safety or health complaint or has testified or otherwise acted to exercise rights under the safety and health provisions of this title for themselves or others.
(1979, c. 354.)

§ 40.1-51.2:2. Remedy for discrimination.

- A. Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of § 40.1-51.2:1 may, within 60 days after such violation occurs, file a complaint with the Commissioner alleging such discharge or discrimination. The employee shall be prohibited from seeking relief under this section if he fails to file such complaint within the 60-day time period. Upon receipt of such complaint, the Commissioner shall cause such investigation to be made as he deems appropriate. If, upon such investigation, he determines that the provisions of § 40.1-51.2:1 have been violated, he shall attempt by conciliation to have the violation abated without economic loss to the employee. In the event a voluntary agreement cannot be obtained, the Commissioner shall bring an action in a circuit court having jurisdiction over the person charged with the violation. The court shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay plus interest at a rate not to exceed eight percent per annum.
- B. Should the Commissioner, based on the results of his investigation of the complaint, refuse to issue a charge against the person that allegedly discriminated against the employee, the employee may bring action in a circuit court having jurisdiction over the person allegedly discriminating against the employee, for appropriate relief. (1979, c. 354; 2001, c. 332; 2005, cc. 743,789.)

William E. Coyote v. ACME Corporation

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